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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 200.

EDWARD J. WETZEL,
Defendant-Appellant,
against
THE STATE OF OHIO,
Plaintiff-Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

MOTION TO DISMISS APPEAL,
Or, in the Alternative, Motion to Affirm Order Appealed From.

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

MOTION TO DISMISS APPEAL, Or, in the Alternative, Motion to Affirm Order Appealed From.

Leave having been granted by this honorable Court, to file this motion to and including August 21, 1962 and under Rule 16, this Appellee moves that the appeal be dismissed, or, in the alternative, that the order appealed from be affirmed on the following grounds:

(a) The appeal does not present substantial federal questions.

(b) The appeal was not timely or properly raised, or expressly passed on.

(c) The judgment rests on an adequate non-federal basis.

The foregoing grounds are discussed, both as to fact and as to law, in the accompanying brief in support of the motion.

Respectfully submitted,

FORREST H. BACON,
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Wyandot County, Ohio,
104 East Wyandot Avenue,
Upper Sandusky, Ohio.

August 10th, 1962.

BRIEF OF APPELLEE.

OUTLINE OF THE CASE.[1]

The Appellant, Edward J. Wetzel, was tried by a petit jury, Court of Common Pleas, Wyandot County, Ohio, and convicted for violation of Section 2905.34 of the Revised Code of Ohio, for unlawfully and knowingly having in his possession and under his control, obscene, lewd and lascivious picture photographs, pamphlets and other articles all of an indecent and immoral nature.

The evidence in the trial court showed that the Appellant owned a canvas-covered trailer which he stored in an unmhabited open barn in Wyandot County, Ohio. This trailer was on wheels and bound by chains and locked with padlocks (R. 4 through 7). The Appellant kept this trailer stored in the barn which was owned by his mother-in-law. The tenants who lived on the farm and other witnesses testified that they saw Appellant visit this trailer many times and no one else exercised possession or control over it.

The Sheriff of Wyandot County, Ohio, acting on information received from the Chief of Police of Cleveland, Ohio, visited the trailer, observed its mobile condition, entered the trailer and found over 19,000 pieces of obscene materials. The Appellant was subsequently arrested and on his person were found keys that fit the padlocks which locked the trailer. Further, in the materials found in the trailer, the Sheriff of Wyandot County, Ohio, found an envelope with the Appellant's letter head printed on it.

The witnesses at the trial of the cause testified that the trailer had been placed on the farm around November,

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[1] As per Appellant's brief, reference to the Bill of Exceptions will be by the designation "R."

1958 and the trailer was there on the farm until the time the Sheriff of Wyandot County, Ohio took possession of it on February 8, 1960. It was during this period of time the witnesses testified that the Appellant was frequently seen in the vicinity of the trailer and on one occasion he was seen with another woman who had backed her car up to the trailer (R. 80 and 82) and on another occasion he was seen carrying a package from the trailer approximating the packages of obscene literature (R. 90).

The obscene materials that the Sheriff of Wyandot County, Ohio removed from the trailer consisted of 19,777 items of paper bound cartoon type pamphlets, photographs, playing cards, miniature eye-viewers and cartoon type pictures bound in small paper packages (R. 7). These items were identified by the Sheriff of Wyandot County, Ohio at the time of the trial, introduced into evidence and then submitted to the jury along with the balance of the evidence.

The only evidence that the Appellant offered was his own testimony and the medical testimony of a medical doctor who testified as to the poor health of the Appellant.

The jury returned a verdict of guilty against the Appellant for the violation of Section 2905.34 of the Revised Code of Ohio and was duly sentenced by the Court of Common Pleas of Wyandot County, Ohio on May 25, 1960. The Court of Appeals, Wyandot County, Ohio, reversed the Court of Common Pleas and certified the cause to the Supreme Court of Ohio as being in conflict with *State of Ohio v. Mapp*, 170 O. S. 427 (1960). On the 17th day of January, 1962, the Supreme Court of Ohio reversed the Court of Appeals for Wyandot County, Ohio and affirmed the Court of Common Pleas.

On April 26, 1962, the Appellant died.

The cause is now before this honorable Court.

PRELIMINARY CONSIDERATION.

As has been previously set forth in the Appellant's Brief, the Appellant, Edward J. Wetzel, is now deceased, having died on April 26, 1962 and the question of the legality of the Appellant's conviction under Section 2905.34 of the Revised Code of Ohio has now become moot.

The purpose of the conviction was to punish the said Edward J. Wetzel and he, is now deceased and beyond the reach of any criminal proceedings. The said Edward J. Wetzel cannot be required to serve the sentence as imposed by the Court of Common Pleas of Wyandot County, Ohio for the violation of said Section 2905.34, which was the sole purpose of the proceedings against him. To decide the issues in the case would be futile as it can only now be a hypothetical question as the subject of the action cannot be required to serve the sentence.

Singer v. United States, 323 U. S. 338;

United States v. Johnson, 319 U. S. 503 at page 520 (footnote);

American Tobacco Co. vs. U. S., 328 U. S. 781 at page 815 (footnote);

Liggett & Myers Tobacco Co., et al. v. U. S., 327 U. S. 764;

U. S. v. Pomeroy, 152 F. 279.

To invoke the jurisdiction of a court of justice, as to a cause or right of action, it is essential that there be involved a real and existing controversy, calling for a present adjudication involving present rights, something further than a mere declaration of right. It has been further stated in Volume 1, C. J. S., page 1015, "Jurisdiction will not be retained merely to determine incidental questions such as costs." Adopting this reasoning, the real or substantial issue in this case was the legality of punish-

ing a person for the violation of a statutory crime and the costs were an incidental issue, one not involving public importance and due to the death of such person, the substantial question has become moot. In *Mills v. Green*, 159 U. S. 651: "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect * * *." In the instant case the judgment cannot be carried into effect.

QUESTION 1.[1]

The issue involved in Item I of Appellant's Brief at page 15, is whether this instant case is to be distinguished from *Eleazer Smith, Appellant v. People of the State of California*, 361 O. S. 147, based upon the facts that in the *Smith* case the defendant was a book seller and in the instant case the defendant (Appellant) was not so engaged, according to his testimony. The question involved in the *Smith* case was whether a statute involving possession of obscene literature could stand as not being in violation of constitutional rights if it dispensed with the requirement of "knowledge" on the part of the possessor of the obscene materials. The principal question was not concerned with booksellers as such but rather the question of the requirement of "knowledge." In the *Smith* case, it is to be noted that the ordinance involved, Los Angeles Ordinance Section 41.01.1 reads in part as follows:

> "Indecent writing, etc.—Possession Prohibited.
>
> "It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, mo-

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[1] Question 1 concerns itself with item 1, Page 15, Appellant's Brief

tion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places * * *"

The Ordinance then enumerates various places where possession is prohibited.

It is to be noted that Section 2905.34 of the Revised Code of Ohio, with which statute we are concerned in the instant case and the Los Angeles Ordinance involved in the *Smith* case, are very similar. Both the Ohio and Los Angeles legislation are concerned with a "person" having in his "possession" "obscene" books, writings, etc. The only difference between the Ohio Statute and the Los Angeles Ordinance is the requirement of knowledge which the Ohio Statute had and the Los Angeles Ordinance did not have.

At page 161 of the *Smith* case, *supra*:

"The Court disposes of the case exclusively by sustaining the Appellant's claim that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment precludes a state from making the dissemination of obscene books an offense merely because a book in a bookstore is found to be obscene without some proof of the bookseller's *knowledge* (italics mine) touching the obscenity of its control."

At page 153 of the *Smith* case, *supra*:

"By dispensing with any requirement of *knowledge* (italics mine) of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutional-protected matter."

In *Roth v. United States*, 354 U. S. 476, it is to be noted that in the case of *Alberts*, the Los Angeles Ordinance involved required knowledge.

QUESTION 2.[1]

The application of the present case does not broaden the statute's terms to include constructive possession.

In the first instance, the instant case is not involved in constructive possession. The obscene materials were found in a locked trailer. The trailer was registered in the name of the Appellant; his keys fit the padlocks on the trailer. According to the testimony he exercised exclusive control over the trailer. The obscene materials were in the Appellant's immediate possession.

According to *Webster's New International Dictionary*, 2nd Edition, under the word "'possession,'' the following definition appears:

> "The thing possessed; that which anyone occupies, owns, or controls; * * *."

Under the word "constructive" the following definition appears:

> "That is virtual which exists in essence or effect but not in actual fact."

In the instant case, the Appellant did occupy, own and control the trailer and consequently controlled the contents thereof. His was not a constructive possession, i.e. one that existed only in essence or effect but not in actual fact.

In the *Smith* case, *supra*, which is a case in point as to possession, the Court was not concerned with the type of possession involved. The legislation involved in that case was similar to Section 2905.34 of the Revised Code of Ohio and the question of constructive possession was not involved as it is not in the instant case.

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[1] Question 2 concerns itself with Item 2, Page 17 of Appellant's Brief.

A careful reading of the Opinion of the Supreme Court of the State of Ohio in the instant case, the instructions of the Court of Common Pleas of Wyandot County, Ohio and the findings of the jury based on said instructions, denote the fact that constructive possession is not applied in the present case to broaden Section 2905.34 of the Revised Code of Ohio to include said constructive possession.

QUESTION 3.[1]

Quoting from page 19 of the Opinion of the Supreme Court of the State of Ohio in this instant case, 173 O. S. 16, the Court stated:

> "It is a well established principle of law that a statute, under one application, may operate unconstitutional, but under another and different application, its operation may be perfectly valid. Such was the pronouncement of the Supreme Court of the United States in the case of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 * * *."

The Supreme Court of the State of Ohio, based upon the evidence that the Appellant had in his possession over 9,000 pieces of obscene materials; many of them duplicate copies, and that the Appellant had the same in his exclusive possession, deduced that the same was held by him knowingly and with intent to sell. This was further evidenced by the fact that on one occasion Appellant was seen removing a package from the trailer and on another occasion the Appellant was accompanied by a woman in another automobile to the trailer. *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509.

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[1] Question 3 concerns itself with Item 3, Page 18, Appellant's Brief.

In *Alberts v. California*, 354 U. S. 476 (*Roth, supra*), the constitutionality of a state statute and a conviction thereunder for keeping for sale obscene and indecent books was sustained.

QUESTION 4.[*]

Under 18 U. S. C. Section 1461 the mailing of obscene materials in any class is subject to a fine and imprisonment and further second class mail rights may be voided after they have been published under 39 U. S. C. Section 232, and so sufficient control does exist which was in all probability considered by the Ohio Legislature at the time of its enactment of Section 3767.01 of the Revised Code of Ohio. The federal government controls the sending of all classes of mail and therefore as regards obscene materials, the Ohio Legislature exempted the same from the provisions of Section 2905.34 of the Revised Code of Ohio and left the same to the enforcement officials of the United States Government.

Concerning Section 2905.37 of the Revised Code of Ohio, in relation to Section 2905.34 of the Revised Code of Ohio, Section 2905.37 is quoted in part as follows:

> "Whose *demonstrated purpose* (Italics mine) does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code * * *."

The *demonstrated purpose* of Section 2905.34 of the Revised Code of Ohio is to restrict obscene materials; materials which arouse the prurient interest in a person. It is to be noted in Section 2905.37 of the Revised Code of Ohio, if the materials are for "medical books," "practitioners of medicine or druggists," "bona fide works of art" they are exempt from Section 2905.34 of the Revised Code

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[*] Question 4 concerns itself with Item 4, Page 19, Appellant's Brief.

of Ohio, *i.e.* if the *demonstrated purpose* is not to raise the prurient or lewd interests of man (*Roth* case, *supra*), but rather to advance and raise the state of man, the same are acceptable. This is a valid distinction and does not offend the equal protection clause of the Fourteenth Amendment.

QUESTION 5.[*]

Even if the question of illegal search and seizure had been raised opportunely by the Appellant, and assuming for the purposes of this brief that a search warrant had not been obtained, the question raised is whether the search was reasonable based upon the doctrine set forth in the search was reasonable based upon the doctrine set forth in the below cited *Weeks*, *Harris* and *Robinowitz* cases. It is to be remembered from the record that the Sheriff of Wyandot County, Ohio had received a telephone call from the Chief of Police of Cleveland, Ohio as to certain obscene literature being stored in a certain trailer at a certain location. Acting on the information thus received, he proceeded to the area. He discovered a trailer which trailer could have been easily removed. He had received certain information, which information had proven correct. The Sheriff's belief at this point that the trailer contained obscene literature was reasonable. The information received up to the time he entered the trailer had proven correct. Further the Sheriff was faced with the decision that if he left the same, the trailer could easily have been removed. Acting in a way that was reasonable at the time and the place, he entered the trailer and found the obscene literature. There were no officers with him who could have been left to guard the trailer. *Weeks v. United States*,

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[*] Question 5 concerns itself with Item 5, page 20 of Appellant's Brief.

232 U. S. 383; *Harris v. United States*, 331 U. S. 145; *United States v. Robinowitz*, 339 U. S. 56.

It is to be noted further that the place entered and searched was not a man's home or private residence as was the situation in *Mapp etc., Appellant v. Ohio*, 367 U. S. 643. In the instant case the Sheriff did not have to break the doors down of any building. The trailer was sitting in an open shed attached to a barn. The guaranty of freedom from unreasonable search and seizure is construed as recognizing a necessary difference between a search of a dwelling house or other structure in respect of which a search may readily be obtained, and a search of a ship, motorboat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Carrol v. United States*, 267 U. S. 132.

The appellant states that the exclusionary rule was not available to him as set forth in the *Mapp* case, *supra*. The Appellant cannot complain that he did not have the opportunity nor the right to raise the question at the trial level. The Appellant has had all of the cases concerning the question before him.

Boyd v. U. S., 116 U. S. 116 (1886);
Weeks v. U. S., 232 U. S. 383 (1914);
Olmstead v. U. S., 277 U. S. 438 (1928);
McNabb v. U. S., 318 U. S. 332 (1943);
Wolfe v. Colorado, ---------- (1949);
Elkins v. U. S., 364 U. S. 206 (1960).

Based upon the foregoing line of decisions, if the evidence was illegally obtained as stated by the Appellant, he had every reason to have raised the question and have objected to its admission. This he failed to do and he has

waived it. It is not a part of the record and therefore the issue does not appear before the Court.

From a reading of the record of the testimony as presented at the trial in the Court of Common Pleas of Wyandot County, Ohio, nowhere is it noted that the Appellant objected to the admission of the evidence which consisted of pornographic literature. On pages 109 and 110 of the said record of testimony the Appellant stated clearly his reasons for objecting to the admission of the contents of the trailer into evidence which reasons were not that it was obtained as a result of an illegal search and seizure. Further the decision of the Ohio State Supreme Court in this case, *State v. Wetzel*, 173 O. S. 16 at page 20 stated: "that there may have been an illegal search and seizure was mentioned only casually in the Court of Appeals." In carefully reading the Opinion of the Court of Appeals, a mention of this fact cannot be found.

We can therefore assume that the Appellant did not, either at the trial level or at the first stage of appeal, raise any objections to this evidence and there is nothing in the record concerning the issue of admission of evidence obtained as a result of an illegal search and seizure upon which to base an appeal.

The Appellate Court can and will only consider errors which are apparent on the record and such errors must actually appear. The record must clearly show and point out the error complained of, as all questions must be determined by the record as certified to the Appellate Court. It is a general proposition that if the appellant fails to bring up to the Appellate Court a sufficient record to reveal the error he alleges, his appeal must fail. *Braverman v. United States*, 317 U. S. 49; *United States v. Hoffman*, 335 U. S. 77; *Lynch v. United States*, 292 U. S. 571; *Mennich v. Garner*, 292 U. S. 4.

CONCLUSION.

For the reasons set forth in this brief, supporting the grounds stated in the motion, it is requested that Appellant's appeal be dismissed, or, in the alternative, that the order appealed from be affirmed.

Respectfully submitted,

FORREST H. BACON,
Prosecuting Attorney
of Wyandot County, Ohio,
Attorney for Plaintiff-Appellee.

August 10, 1962.

APPENDIX.

MAJORITY OPINION OF THE SUPREME COURT OF THE STATE OF OHIO.

ZIMMERMAN, acting C. J.: Section 2905.34, Revised Code, in its pertinent parts reads as follows:

"No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print (or) picture * * *.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

On the trial, evidence presented by the state showed that on February 8, 1960, pursuant to a telephone call, the sheriff of Wyandot County went to a farm owned by the defendant's mother-in-law and located on a county road in Wyandot County some two and one-half to three miles west of the city of Carey. There, in a small barn on the premises, the sheriff found a chained and padlocked automobile trailer belonging to the defendant and admittedly placed there by him. The sheriff cut the chains, opened the trailer and discovered over 19,000 packaged duplicate items wrapped in brown paper sacks and consisting of illustrated pamphlets, photographs and reproductions of photographs and pen-and-ink drawings accompanied by reading matter, most of which material was of the lewdest and most lascivious character—an assorted collection of filth, shocking and repugnant to the average normal individual of any locality; in short, pornography at its very worst.

On the following day, the defendant was apprehended and charged with the crime defined in Section 2905.34, Revised Code. There were found in his possession keys

which fitted the padlocks fastening the chains on the trailer.

Witnesses who lived nearby testified that to their knowledge defendant visited the part of the barn in which the trailer was housed some seven or ten times between November of 1958, when the trailer was placed in the barn, and February of 1960 and remained for periods of from ten to fifteen minutes to an hour. On one occasion, one of the witnesses observed the defendant carrying from the barn a brown colored package resembling and about the size of a shoe box. The defendant told the witness that, upon request, he occasionally sold material contained in the trailer.

In his own defense, defendant testified that he had not placed the chains and padlocks on the trailer and was unaware of the trailer's contents. He said that he had leased the trailer to another, with the privilege of purchase, and that he, defendant, visited it solely to see whether it was intact and unmolested. Defendant testified further that he secured the keys to the padlocks from the one to whom he had leased the trailer, and that such person was then serving a term in the Ohio Penitentiary.

The only other witness appearing for the defendant was a medical doctor who was treating the defendant professionally. He testified as to defendant's poor physical condition due to a heart ailment, hardening of the arteries and other disorders of internal organs. He said further that the defendant was incapable of strenuous physical activity.

It is a well established principle of law that a statute, under one application, may operate unconstitutionally, but, under another and different application, its operation may be perfectly valid. Such was the pronouncement of the Supreme Court of the United States in the cases of

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S., 282, 66 L. Ed., 239, 42 S. Ct., 106, second headnote; and *Alabama State Federation of Labor v. McAdory*, 325 U. S., 450, 462, 89 L. Ed., 1725, 1735, 65 S. Ct., 1384, 1390. Or, as was held by this Court in the first paragraph of the syllabus of *State, ex rel. Herbert v. Ferguson, Aud.*, 142 Ohio St., 496, 52 N. E. (2d), 980, "where, under one state of facts, the operation of a statute is constitutional, a court will not declare it invalid because under another state of facts, not involved, its operation would be unconstitutional."

To the same effect, see *State, ex rel. Speeth et al., Board of County Commrs., v. Carney, Aud.*, 163 Ohio St., 159, 126 N. E. (2d), 449.

Here, under the state's evidence, the deduction is warranted that this large quantity of pornographic material was possessed by defendant with knowledge of its nature, and that it was held for sale and distribution. The situation differs from one where an individual merely possesses material of that kind for his own private purposes.

Therefore, we think the quoted portions of the statute are constitutional and valid as applied to the defendant under the evidence outlined above.

The instant case is unlike that of *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215. That case involved an ordinance of the city of Los Angeles making it unlawful for any person to have in his possession any obscene or indecent book in any place where books are sold or kept for sale. The court construed the ordinance as fixing strict or absolute criminal liability, without requiring any element of scienter, *i.e.* knowledge by the defendant bookseller of the contents of the book for the possession of which he was convicted. The majority of the

court held that that ordinance, although directed to obscene matter, violated the constitutionally protected rights of freedom of speech and of the press, because it lacked the element of scienter on the part of the bookseller.

Surely the state in the exercise of its sovereign power may enact and enforce legislation designed to protect its people, particularly the young, inexperienced and unsophisticated, from the corrupting and degrading influence of what is plain unmitigated filth.

We are not confronted here with an illegal search and seizure in violation of defendant's constitutional rights. No objection was made by defendant in the trial court to the introduction of the pornographic material taken from the trailer on that ground, and that there may have been an illegal search and seizure was mentioned only casually in the Court of Appeals. *State v. Mapp* (U. S.) 6 L. Ed. (2d), 1081, 81 S. Ct. 1684.

The judgment of the Court of Appeals is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.